90-1626

Supreme Court, U.S.
FILED
APR 22 1991
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MANLEY ABERCROMBIE, ROBERT Q. CALLOWAY, RICHARD F. ECKEL, DONALD E. HEDRICK, and E. WESTON SLOAN,

Petitioners

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Wayne Hartke
Hartke & Hartke
Attorneys for Petitioners
7637 Leesburg Pike
Falls Church, Virginia 22043
Telephone: 703/734-2810

QUESTIONS PRESENTED:

1. Whether subject matter jurisdiction exists for violations which occurred in the past under a penal statute written by Congress in "present tense" language.

2. Whether a penal statute, imposing civil money penalties under 12 USC 1818(i)(2) and 12 U.S.C. 93(b) on bank directors for past acts, requires a strict statutory construction of the words used in the statute.

3. Whether statutory language written in a penal statute which uses past tense language in a section (a) and present tense language in the next section (b) of the same statute can be construed to have both sections apply to past acts.

4. Whether a subsequent statute, which is **in pari materia** to the original statute, bars liability for past acts of these directors, when the original statute is written in "present tense" language but with no specific reference to liability for past acts, and the subsequent statute which is **in pari materia** to the original statute retains the same "present tense" language but adds liability for past acts which would exclude liability on the bank directors at issue.

5. Whether a "Notice of Assessment of Civil Money Penalties" containing specified alleged violations constitutes a Procedural Due Process Notice, or is a "gratuitous" document rendered unnecessary by the execution of a Cease and Desist Order reciting the terms of an agreement between a bank and its regulatory body.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2, 3
STATEMENT OF THE CASE	3
BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE	3
Whether civil money penalties under 12 USC 93(b) and 12 USC 1818(i)(2)(i) can be imposed for wholly past acts.	4
1. The statutory language is clear; penal statutes are to be strictly construed.	7
2. Conclusory finding of ambiguity; misquote of Supreme Court's opinion.	14
3. Pervasive use of the present tense.	16

Page

4. This decision requires one to ignore words in the legislative history. 17

5. Amended statute, in pari materia, mandates statutory construction of prior act as barring liability for past acts. 20

6. The "Notice of Assessment" is a document mandated by procedural due process; it is not gratuitous. 25

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED. 27

I. Violates U.S. Supreme Court precedent; statutory language is unambiguous; misquotes U.S. Supreme Court; potential of "avalanche of errors" in reliance on misquote. 27

II. Contrary to rules of statutory construction; penal statute; constitutes judicial re-writing of statutory words. 28

III. Violates binding 7th Circuit precedent; violates rule of statutory construction when sec. A is in past tense, and sec. B is in present tense. 28

IV. Requires Court to ignore terms contained in the legislative history. 29

Page

V. Violates Rules of statutory construction for statutes in pari materia. 29

VI. Violates procedural due process rights of bank directors. 29

CONCLUSION 30

TABLE OF AUTHORITIES

	Page
12 USC 93 (a)	14,
12 USC 93 (b)	3, 6, 7, 17, 27
12 USC 1818 (i)(2)(i)	2, 3, 4, 6, 7, 17, 27
12 USC 1818 (i)(2)(iii)	3
12 USC 1818 (i)(2)(iv)	4
U.S. Senate Report 95-323, 1st Sess. (1977).	18
Cases:	
Abercrombie, et al. v. Office of the Comptroller of the Currency, (Decision below, **Abercrombie II**) 920 F2d 1351 (7th Cir., 1990).	2, 4, 6, 15, 18, 21, 25, 27
Abercrombie, et al. v. Office of the Comptroller of the Currency, (**Abercrombie I**), 833 F2d 672 (7th Cir., 1987).	16, 17, 25
Alexander v. Alexandria, 5 Cranch 1, 3 L.Ed. 19 (1809).	22
Cutten v. Wallace, 80 F2d 140 (1935).	9, 10, 12, 15, 28

Page

Garner v. Louisiana, 368 US 157, 7 L Ed2d 207, 82 S Ct 248 (1961). 24

Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., et al., 484 US 49, 98 L Ed 2d 306, 108 S Ct 376, at p. 381. (1987). 7, 8, 12, 13, 16, 17, 26, 28

Tiffany v. The National Bank of the State of Missouri, 18 Wall 409, 85 US 862 (1873). 8

United States v. Freeman, 3 How 556, 11 L.Ed 724 (1845). 23

United States v. Montgomery Ward & Co., 150 F2d 369 (7th Cir.). 23

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

MANLEY ABERCROMBIE, ROBERT Q. CALLOWAY, RICHARD F. ECKEL, DONALD E. HEDRICK, and E. WESTON SLOAN,
Petitioners

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS Manley Abercrombie, Robert Q. Calloway, Richard F. Eckel, Donald E. Hedrick, and E. Weston Sloan petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

A decision was rendered by the United States Court of Appeals for the Seventh

Circuit on December 26, 1990, and after timely filing of petitioner's Petition for Rehearing with Suggestion of En Banc, the same Court denied the Rehearing and Rehearing En Banc on January 23, 1991. The decision of the United States Court of Appeals for the Seventh Circuit is attached as Appendix A. The decision is reported in 920 F2d 1351.

JURISDICTION

The decision of the Court of Appeals was decided on December 26, 1990. Petitioners timely filed their Petition for Rehearing with Suggestion of En Banc, and the Petition for Rehearing and of the Rehearing En Banc was denied on January 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 1818 (i)(2)(i) provides:

Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final and was issued pursuant to subsection (b) or (c) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: Provided, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the appropriate Federal banking agency by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

12 USC 93(b) contains identical language.

Statement of the Case

Federal jurisdiction is conferred pursuant to 12 USC 1818(i)(2)(iii) which provides for an initial administrative hearing, with the right to petition for review by the U.S. Court of Appeals

pursuant to 12 USC 1818(i)(2)(iv). As stated by the Court below, "[T]he basic question before us is whether the Comptroller appropriately determined that civil money penalties could be assessed for **past** violations of cease and desist orders." (920 F2d at p.1356). 12 USC 1818(i)(2) is a penal statute providing for imposition of civil money penalties for violations of a cease and desist order signed by the directors of Rushville National Bank (hereinafter referred to as "Bank") and its regulatory agency, the Office of the Comptroller of the Currency (hereinafter referred to as "OCC"). The statutory language reads in pertinent part:

> "Any ... director ... who violates the terms of any order which has become final ... shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues.... As used in

this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation." 12 USC 1818(i)(2)(i); see also 12 USC 93(b) (as written in 1985). (underlining added).

The OCC sought to impose those civil money penalties on the Rushville National Bank directors (referred to hereinafter as "directors") for violations which appeared in the OCC's examination of the Bank dated January 31, 1985. The Notice of Assessment was dated October 25, 1985. That Notice alleged "past tense" violations:

> "The Office of the Comptroller of the Currency has issued a Notice of Assessment of a Civil Money Penalty against each member of the Board of Directors who participated ;in the violation..." (Cover letter to the Notice of Assessment from OCC dated October 25, 1985. underlining added).
>
> "This assessment is issued on the basis of violations ... which occurred ..." ...

> "The January 31, 1985 Report of Examination ... revealed that the Board of Directors violated ten (10) Articles..." ...
>
> "RESPONDENTS caused, brought about, participated in, counselled or aided and abetted the violation ..." (See Notice of Assessment of Civil Money Penalties, October 25, 1985) (underlining added).

Significantly, the October 1985 Notice of Assessment stated that the directors (Respondents) were afforded the administrative hearing pursuant to both 12 USC 93(b) and 12 USC 1818(i)(2), which contain identical present tense language.

Since the violations recited in the January 31, 1985 examination involved acts which were fully terminated by April 8, 1985, (See opinion below, 920 F2d at 1355) it is clear that the OCC seeks to impose liability on the bank directors for "past acts" by resort to a penal statute written in the "present tense." The directors

assert that there is no subject matter jurisdiction, and that the principles of statutory construction bar imposition of these civil money penalties.

1. The statutory language is clear; penal statutes are to be strictly construed. The directors urge that the language of Sections 93(b) and 1818(i)(2)(i) are clear and unambiguous in the "present tense" words. This Court has held:

> "It is well settled that "the starting point for interpreting a statute is the language of the statute itself. Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)." Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., et al., 484 US 49, 98 L Ed 2d 306, 108 S Ct 376, at p. 381. (1987).

The words of these statutes (93(b) and 1818(i)(2)(i)) contain no language in the past tense. To rule that these statutes

apply to "past tense" behavior requires a change from the existing tense of the verbs.

In Tiffany v. The National Bank of the State of Missouri, 18 Wall 409, 85 US 862 (1873), the Supreme Court held:

> "In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it." Id., at 85 US 863.

This principle of statutory construction has continued intact to this day. In 1987, this Court specifically ruled that "past tense penalties" cannot be imposed under the terms of a "present tense" statute. This Court in Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc., et al., 484 US 49, 98 L Ed 2d 306, 108 S Ct 376 (1987) held that federal

subject matter jurisdiction was not conferred by a statute containing the "present tense" language of Sec. 505(a) of the Clean Water Act, i.e., "alleged to be in violation." That language is less clearly "present tense" language than the case at bar. The present case contains more clear "present tense" language of "violates ... as long as the violation continues ... causing, aiding, abetting."

In the Seventh Circuit, there is a case from 1935 which is directly on point, strictly construing the statutory words "is violating" and "is attempting to manipulate." In Cutten v. Wallace, 80 F2d 140, the Seventh Circuit was analyzing the Grain Futures Act. The case is remarkably similar to the case at bar in that it compares Section 6(a) with 6(b) of the Grain Futures Act whereas the case at bar

involves the comparison of 12 USC Section 93(a) with 93(b). In both comparisons, subsection (a) contains "past tense language" whereas subsection (b) contains "present tense language." The Seventh Circuit held that to impose "past tense liability" under the "present tense language" would constitute the "usurping of the function of Congress." The Seventh Circuit stated:

> "The determination of the appeal, therefore, turns upon the use of the words "is violating" and "is attempting to manipulate" in said section.
>
> Respondents argue that although the statute uses the present tense, it should be so construed as to include past transactions. A rather strong and persuasive argument is made in favor of the wisdom of such a construction without which the power to deal with an offender is almost nil. We are, however, required to construe the statute,-not to pass upon its purposes, but upon its wording.
>
> Support for limiting the construction of the words so as to exclude instances where the violation has occurred may be found in section 6(a) (7 U.S.C.A. Sec. 8). There,

referring to the failure of the board of trade to comply with the requirements of the Act, we find the words "has failed or is failing" to comply with "any of the above requirements." What effect then must we give to the language of section 6(b) where the words "has failed" are omitted?

It is admittedly rather difficult to understand why Congress would, when dealing with the punishment of a Board, include past as well as present violations, whereas in section 6(b) when dealing with the punishment of the individual trader, it provides for punishment only when such person "is violating" or "is attempting to manipulate the market." ...

We are not, however, persuaded that the words of the statute here used can or should be so stretched as to include past violations which were committed and completed two years before the complaint was filed. ...

While respondents' counsel has ably argued that the commission should have the power to suspend for past transgressions and without such authority the section is sterile-yet they have not met the stubborn and inescapable fact that Congress has spoken in two successive sections. In one it expressly included past as well as present violations and in the next section specified only existing violations as grounds for suspension. To extend the latter section to the breadth of the former would be usurping the function of Congress." Cutten v.

Wallace, supra., at p. 142-144.

In comparison to the case at bar, Section 12 U.S.C. 93(a) uses the words participated and assented. Whereas, the very next subparagraph, Section 93(b) uses the present tense:

participating, violates, continues, ... causing, bringing about, participating in, counseling, or aiding or abetting a violation." 93(b) and 1818(i)(2)(i), (underling added).

Both in Cutten, supra., and the case at bar, the precedent is binding, and the legal reasoning is equally compelling. (The Seventh Circuit opinion in the case at bar does not refer to its own precedent in Cutten v. Wallace).

Further reinforcing this legal reasoning, this Court stated:

> "Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option." Gwaltney, 108 S Ct at page

381.

The U.S. Supreme Court recited the contention of the prevailing party in Gwaltney at p. 380, paragraph 2:

> "Gwaltney argued that the language of Sec. 505(a), ... requires that a defendant be violating the Act at the time of suit. Gwaltney urged the District Court to adopt the analysis of the Fifth Circuit in Hamker v. Diamond Shamrock Chemical Co., 756 F2d 392 (1985), which held that "a complaint brought under [Sec. 505] must allege a violation occurring at the time the complaint is filed." Id., at 395. Gwaltney contended that because its last recorded violation occurred several weeks before respondents filed their complaint, the District Court lacked subject-matter jurisdiction over respondents' action." (Gwaltney, supra., at page 380, underlining added). ...
>
> Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past violations." Gwaltney, supra., at p. 381, underlining added.

The above stated contention is identical

to the contention of the directors in the case at bar. The statutory language bars imposition of civil money penalties for past acts.

2. Conclusory finding of ambiguity; misquote of Supreme Court's opinion. The Court below held that the statutory language was "ambiguous," thus opening the door to interpreting the intent of Congress. First, the directors strenuously argue that there is no ambiguity in the tense of the language contained in the statute, nor is there any ambiguity that the preceding section of law (93(a)) is written in the "past tense" evidencing that Congress knows how to write in both the past and present tense. The Court's conclusory statement that these words are ambiguous is directly contrary to their earlier interpretation

of the same language and analysis in Cutten v. Wallace, supra. The directors urge that the finding of "ambiguity" in the language is a goal oriented conclusion which contradicts binding rules of statutory construction that clearly apply.

Attempting to justify an "ambiguity," the Court below makes the conclusory statement that "the language in question is not so clear that it can support only the Directors' interpretation." (920 F2d at 1357). In a footnote on that page, the Court below misquoted the Supreme Court's opinion. The Seventh Circuit opinion states in the footnote:

> "Nonetheless, in dicta, the Court noted that "it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations." (920 F2d at 1357).

The actual language of the opinion does not end with a period at that point. The opinion in its entirety states:

> "Because it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations, respondents contend, the parallel language of Sec. 309(a) and Sec. 505(a) must mean that citizens, too, may maintain such actions.
>
> Although this argument has some initial plausibility, it cannot withstand close scrutiny and comparison of the two statutory provisions." (Gwaltney, supra., at 108 S Ct 381-2, underling and emphasis added).

Thus, rather than being the holding of the Supreme Court, the quoted section in the Abercrombie footnote was merely the contention by the respondents which was rejected. (In addition, please note that the authority of the Administrator was never briefed in Gwaltney).

3. Pervasive use of the present tense. The opinion below states:

> "As this court noted in Abercrombie

> I, the Directors' reading of the statutory language can be characterized as "reasonable." 833 F2d at 676. Use of the present tense verbs throughout the subsection in question can be read as evidencing a congressional intent "to emphasize that Sec. 1818 provides a daily penalty for continuing violations" only, not for past violations. (Abercrombie II, 920 F2d at 1357).

Similarly, this Court in Gwaltney, supra., looked to the tense of the verbs in its statutory construction:

> "One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense." Gwaltney, supra., at p. 382, (underlining added).

There is no past tense language at all in 12 USC 93(b) or 1818(i)(2)(i); there is a pervasive use of the present tense.

4. This decision requires one to ignore words in the Legislative history. This decision re-writes the legislative history so that key prospective terms must

be completely ignored. The court below recites the purpose of the civil money penalties from the legislative history to "prevent or correct" violations. (920 F2d at 1358). There is no way to prevent or correct "past acts." The lower Court's decision requires the striking of those words from the legislative history. The legislative history does <u>not</u> say the purpose is to "punish for past acts;" it <u>says</u> to "prevent or correct" - prospective.

Another element contained in the legislative history of 12 USC 1818(i)(2)(i), is the word "cure:"

> "The combination of those powers plus the civil money penalty provisions gives the agencies the power they need to <u>cure</u> unsafe or unsound conditions and to <u>stop</u> violations of laws by holding companies.
>
> ... This latter civil money penalty provision should be particularly helpful in <u>curing</u> unsound or problem situations once they have arisen ..."

S.Rep. 95-323 (1977) at p. 9, underlining added.

If the civil money penalties were intended to apply to "past acts," then there would be no need to refer to the "curing" of acts which had already been terminated (past acts). Further, if the past acts were already "stopped," there would be no need to use the words "to stop violations" in the legislative history. (The Court below mis-stated the directors' argument on "cure." We have never argued that the Notice of Assessment must be suspended to allow for a cure. Our argument is as stated above.

The "self-enforcing" effect stated in the legislative history (Id.) means that once the Notice of Assessment is issued, the directors will not wait for hearings because they see daily penalties accruing,

so they will "stop" the violations by "themselves" to avoid daily penalties. A "self-enforcing effect" is prospective.

5. Amended statute, in pari materia, mandates statutory construction of prior act as barring liability for past acts. The law was amended. It did not remain the same. The Court below recites the amendment on page 1359. Under the rules of statutory construction, the subsequent statute which bars liability against these directors is the same binding construction that applies to the original statute, the statutes being in pari materia.

Under the original law, there was no wording at all that permitted liability for past acts; in the amended law, which is in pari materia in all other respects, there is a clarification of the extent of "past acts" liability. The liability for

"past acts" goes back only to

> after the completion of the last report of examination ..., occurring before the date of the enactment of this Act." (See opinion below, 920 F2d at p. 1359, (2)).

The Congress specifically addressed the issue of past tense liability, and narrowly confined it to circumstances that would not apply to these directors. The Court below admits that even the new law would not impose liability on these directors in this case:

> "Although this retroactive provision would not apply to the conduct in this case, this provision does indicate that Congress did not intend to attach prospective-only effect to the present tense language in the statute." (920 F2d at p. 1359, underlining added).

Had Congress intended to impose liability for all past acts, the new statute would have included such past tense liability within the language of the amendment that dealt with the extent of

past acts liability - but it did not. The new statute definitely prohibits the kind of past tense liability imposed under the case at bar, under the rules of statutory construction for statutes **in pari materia**.

In Alexander v. Alexandria, 5 Cranch 1, 3 L.Ed. 19 (1809) the rule of statutory construction for statutes **in pari materia** was enunciated:

> "...acts in pari materia are to be construed together as forming one act. If in a subsequent clause of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law." (Id., 3 L Ed at p. 21).

The binding rule of statutory construction was reiterated in United

States v. Freeman, 3 How 556, 11 L.Ed 724 (1845):

> "If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute (Lord Raym., 1028); and if it can be gathered from a subsequent statute in pari materia, what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." Id., 11 L Ed at p. 728.

In United States v. Montgomery Ward & Co., 150 F2d 369, the rule of statutory construction is stated:

> ""Unless the context indicates otherwise, words and phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense." Section 5201, Sutherland, on Statutory Construction." (Id., at p. 376).
>
> "More recently, in United States v. Stewart, 311 U.S. 60, 61 S.Ct. 102, 105, 85 L.Ed. 40, the court said: "It is clear that 'all acts in pari materia are to be taken together, as if they were one law.' ... That these two acts are in pari materia is plain. Both deal with precisely the same subject

matter ***. The later act can therefore be regarded as a legislative interpretation of the earlier act..." (p. 376).

"... a rather heavy load rests on him who would give different meanings to the same word or the same phrase ... in Acts which are **in pari materia** with each other." (Id., at 377).

In Garner v. Louisiana, 368 US 157, 7 L Ed.2d 207, 82 S Ct 248 (1961), it was said:

"Shortly after the events for which the petitioners were arrested took place, the legislature amended its disturbance of the peace statute in an obvious attempt to reach the type of activity involved in these cases." (Id., at p. 216).

In the case at bar, the Congress amended its statute to reach "past acts" liability, and Congress added restricted liability for past acts which would have excluded liability for these directors. The fact that the statute was amended to address the critical issue and declined to impose liability as sought by the OCC is

a binding rule of statutory construction on the courts.

6. The "Notice of Assessment" is a document mandated by procedural due process; it is not gratuitous. In oral argument in Abercrombie I (833 F2d 676), in describing the "Notice of Assessment" initiating the administrative process, Circuit Judge Manion coined the phrase "Procedural Due Process Notice Date." It is an apt description. It initiates the civil money penalty process. It is the sole document which recites "violations."

The Court below stated:

> "The banker under a cease and desist order operates with the knowledge that any deviation from that order ... will result in a significant penalty - whether the authorities discover the violation immediately or later." (920 F2d at 1359).

There are two fatal defects to the argument that the C&D Order constitutes

the required "Notice": 1) the C&D Order does not allege "violations" and 2) if the C&D Order constitutes the required "Notice" then the actual "Notice of Assessment" is rendered gratuitous.

In Gwaltney, this Court rejected the idea of a "gratuitous" notice:

> "If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." (Gwaltney, at p. 382, 3).

As in Gwaltney, supra., the "Notice of Assessment" is not a gratuitous act. It is intended as the Notice to directors to stop or cure the violation immediately or face daily penalties, and it is the Procedural Due Process Notice which is the sole charging document. The Court's statement below means that the C&D Order is a charging document which it is not, and if it were upheld, would render the

actual "Notice of Assessment" gratuitous in contravention of Gwaltney. The Court below recited that the "days of violations" were required to be produced (see 920 F2d 1355). The civil money penalties were based on those "days" from the specified articles which were all concluded by April 8, 1985 (Id.), with the Notice of Assessment issued on the Due Process Notice Date of October 25, 1985. Liability for violations which are past acts must look to other enforcement laws; there is no liability for past acts under the "present tense" language of 12 USC 93(b) and 12 USC 1818(i)(2(i).

REASONS FOR GRANTING THE PETITION

The reasons for granting this Petition are as follows:

I. The decision below violates existing precedent from this Supreme

Court, (Gwaltney, supra.) and misquotes the rejected argument of a party in that case as if it were the Court's holding. The opinion below is Plain Error. Further, to allow the misquoted opinion to stand uncorrected could cause an "avalanche of errors" in other courts.

II. The opinion below is contrary to Rules of statutory construction. The language in the statute is clear and unambiguous. Further, the rules of statutory construction require strict construction of penal statutes. This opinion re-writes "past tense" language into a statute devoid of such language.

III. This opinion is contrary to the Seventh Circuit's own binding precedent in Cutten v. Wallace, supra. In addition to its strict construction of present tense language, the precedent is on point in

that in both statutes analyzed, subsection (a) uses the past tense while subsection (b) uses the present tense - confirming that Congress knows how to select the appropriate tense.

IV. The opinion below requires legislative history to be ignored. The expressed statutory purpose "to prevent and correct;" cannot apply to past acts. Other terms in the legislative history such as to "cure" and to "stop" violations have no meaning under this ruling.

V. The opinion below imposes a judicial construction on the re-enacted statute (FIRREA, 1989 - see 920 F2d 1359) authorizing civil money penalties for past acts beyond the narrow and limited scope specifically recited in that law.

VI. The opinion below is contrary to the rules of statutory construction for

statutes **in pari materia.**

VII. This ruling denies procedural due process to bank directors who first learn that "daily penalties" are accruing only by virtue of the "Notice of Assessment."

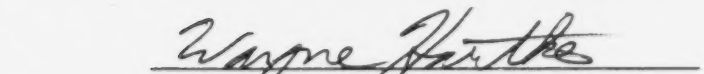
CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

DATED: April 22, 1991.

Respectfully submitted,

Wayne Hartke, Hartke & Hartke



Wayne Hartke

Attorney for Petitioners

Certificate of Service

I hereby certify that 3a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed, certified mail, return receipt requested to Mr. Jeff Gillespie, Office of the Comptroller of the Currency, 490 L'Enfant Plaza, S.W., Washington, D. C. 20219 on this 22nd day of April, 1991.

Wayne Hartke

Wayne Hartke

APPENDIX A

MANLEY ABERCROMBIE, ROBERT Q. CALLOWAY, RICHARD F. ECKEL, DONALD E. HEDRICK, and E. WESTON SLOAN,
Petitioners-Appellants,

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY,
Respondent-Appellee.

Appeal No. 89-2407

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Decided December 26, 1990
Rehearing and Rehearing En Banc
Denied January 23, 1991.

Comptroller of Currency assessed civil money penalties against bank directors for past violations of cease and desist order. Directors appealed. The Court of Appeals, Ripple, Circuit Judge, held that (1) Comptroller had legal authority to assess civil money penalties for past violations of cease and desist orders; (2) statute did not restrict assessment of penalties

only to continuing violations; (3) assessment for violations which occurred prior to issuance of notice was not arbitrary; and (4) Comptroller's determination that gravity of violations justified civil money penalties was supported by substantial evidence.

Affirmed.

The petitioners (referred to collectively as the Directors) served during the relevant period as directors of the Rushville National Bank of Rushville, Indiana (Bank). They seek review of a decision of the Comptroller of the Currency (Comptroller) that assessed civil money penalties against them for violations of cease and desist orders. For the following reasons, we affirm the decision of the Comptroller.

I BACKGROUND

A. Statutory authority

The Comptroller is authorized to order banks and their directors to cease and desist from any violations of law or "unsafe or unsound practice." 12 U.S.C. Sec. 1818(b)(1). Such cease and desist orders may be imposed by consent or may be mandated after a hearing. Id. The Comptroller has discretionary authority to seek enforcement of cease and desist orders in actions brought in federal district courts, id. Sec. 1818(i)(1), or to impose civil money penalties for violation of such orders, id. Sec. 1818(i)(2). For the period in question, the provision authorizing civil money penalties read in pertinent part:

> Any insured bank which violates or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such a bank who violates the terms of any order which has become final and was issued

> pursuant to subsection (b), (c), or (s) of this section, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues... As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

Id. Sec. 1818(i)(2)(i).[1] The amount of the penalty was to reflect the size of financial resources and good faith of the insured bank or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require." Id. Sec.

[1]Subsequent to the events involved in this case, Congress amended section 1818 to provide for larger daily civil money penalties. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73, Sec. 907(a), 103 Stat. 183, 462-64 (codified at 12 U.S.C.A. Sec. 1818(i)(2) (West 1989). Unless otherwise noted, all references to section 1818 in the text are to the version in effect during the relevant period.

1818(i)(2)(ii).

The statute also set out certain procedural requirements. It required the Comptroller to issue a written notice, id. Sec. 1818(i)(2)(i), and permitted those receiving such notice to request an administrative hearing, id. Sec. 1818(i)(2(iii). After such a hearing, the Comptroller made a final decision with respect to penalties. Those against whom civil money penalties were assessed could petition for review by the court of appeals. Id. Sec. 1818(i)(2)(iv).

B. Procedural History

1. Initial administrative proceedings

Pursuant to 12 U.S.C. Sec. 1818(b)(1), the Comptroller and the Bank, through the Directors, entered into a cease and desist order (Consent Order) on June 29, 1983. This Consent Order consisted of sixteen

articles, which outlined steps that the Directors were to take to improve the safety and soundness of the Bank. Additional examinations and meetings between regulators and the Directors followed. Regulators expressly warned the Directors that they faced the assessment of civil money penalties if they failed to comply with the Consent Order. An amended Consent Order was agreed to on June 19, 1984. Regulators continued to find violations of the amended Consent Order. For example, the January 31, 1985 examination[2] found violations of ten articles. The letter transmitting the report of this evaluation to the Directors

[2] The examination was actually conducted in February and March 1985, but is referred to as the January 31, 1985 examination because that is the final date for which financial information was evaluated.

again warned them that they faced the assessment of civil money penalties. Moreover, on June 21, 1985, each Director was sent a letter notifying him that the Comptroller was

> considering whether to assess civil money penalties against the individual members of the Board of Directors... Any such assessment will be founded upon our determination that the individual members of the Board of Directors violated the provisions of 12 U.S.C. Sec. 1818 by failing to substantially comply with the Order to Cease and Desist dated June 29, 1983, and its Amendment dated June 19, 1984.

Ex. OCC24 at 1.

The Comptroller issued a Notice of Assessment of a Civil Money Penalty against the Directors on October 25, 1985.[3] The October 1985 Notice indicated

[3] This notice was amended to correct certain technical and typographical errors on December 5, 1985. For the sake of simplicity, we shall refer to the notices collectively as the October 1985 Notice.

that the penalties were to be issued on the basis of violations of the amended Consent Order, as outlined in the report of the January 31, 1985 examination. The Notice did not specify on which days the alleged violations occurred, nor did it expressly indicate that the violations were continuing as of the date of the Notice. Director Hedrick was assessed a civil money penalty of $15,000, and Directors Abercrombie, Calloway, Eckel, and Sloan were assessed $10,000 each.[4]

The Directors requested an administrative hearing. Before the hearing could be held, however, the Directors filed a motion asking the administrative law judge (ALJ) to dismiss

[4] Director William F. Smith was also assessed a penalty of $10,000. He settled with the Comptroller and is not a party to this appeal.

the proceedings. The Directors cited **Larimore v. Comptroller of Currency**, 789 F2d 1244 (7th Cir. 1986)(en banc), for the proposition that the Comptroller lacked authority to impose personal liability against them without filing suit in district court. The Directors further argued that civil money penalties could not be assessed administratively for past violations because the use of the present tense verb "continues" in the penalty clause of 12 U.S.C. Sec. 1818(i)(2)(i)[5] "requires the violation to be in the present tense." Respondent's [sic] Br. in Support of Their Motion to Dismiss at 2. The ALJ denied this motion.

[5] The relevant clause provided for a "civil penalty of not more than $1,000 per day for each day during which such violation continues." 12 U.S.C. Sec. 1818(i)(2)(i).

2. Judicial proceedings

The Directors then filed suit in district court, seeking to enjoin the administrative proceedings. **See Abercrombie v. Office of Comptroller of Currency**, 641 F.Supp. 598 (S.D.Ind.1986). Again relying on **Larimore** and on their contention that the present tense language of subsection 1818(i)(2)(i) authorized the Comptroller to impose civil money penalties only for continuing violations, the Directors argued that the agency lacked jurisdiction to impose the penalties. **See id.** at 601. The district court concluded, however, that the court lacked jurisdiction over the Directors' action. **Id.** at 600. The court noted that 12 U.S.C. Sec. 1818(i)(1) strictly limited the jurisdiction of courts to enjoin administrative proceedings involving civil

money penalties. Id. Moreover, the statute provided for review of final agency action by the courts of appeal. See id. (citing 12 U.S.C. Sec. 1818(i)(2)(iv)). The district court concluded that the Comptroller's actions in this case did not fall within a judicially recognized exception to subsection 1818(i)(1) because it did not involve a "clear departure from statutory authority." Id. (citing **Groos Nat'l Bank v. Comptroller of Currency**, 573 F2d 889, 895 (5th Cir.1978).

This court affirmed. **Abercrombie v. Office of Comptroller of Currency**, 833 F2d 672 (7th Cir.1987) (**Abercrombie I**). It reasoned that the "'statutory authority' exception" to the limitation on federal court jurisdiction found in subsection 1818(i)(1) applies only when the agency's

action is "'blatantly lawless[.]'" **Id.** at 675 (quoting **Oestereich v. Selective Serv. Sys. Local Bd. No. 11**, 393 U.S. 233, 238, 89 S.Ct. 414, 416, 21 L.Ed.2d 402 (1968)). For two reasons, this exception did not apply. First without deciding the issue, the court observed that this case "does not appear to [be] control[led]" by **Larimore**. **Abercrombie** I, 833 F2d at 676. In **Larimore**, the court held that the Comptroller's authority to issue cease and desist orders under 12 U.S.C. Sec. 1818(b)(1) did not authorize an order to directors personally to indemnify a bank for losses caused by violating statutory limits on the amount of loans given to any one borrower. 789 F2d at 1245. Such an order amounted to the imposition of "personal liability" against the directors. **Id.** The court in **Larimore**

reasoned that such personal liability could not be imposed administratively under subsection 1818(b)(1), but only judicially under 12 U.S.C. Sec. 93(a).[6] Id. at 1256. In **Abercrombie I**, the court observed that the nature of the remedy involved in this case differed from the damages at issue in **Larimore**:

> Section 93(a) is a damages provision; it provides that bank directors may be liable to reimburse the bank or other people the directors have injured by violating banking laws. Section 1818(i)(2)(i), on the other hand, is a penalty provision designed to punish and deter violations of cease and desist orders. The Comptroller need

[6] This statute authorized the Comptroller to sue in district court to determine whether specified banking laws have been violated and whether the franchises of such banks should therefore be forfeited. 12 U.S.C. Sec. 93(a). "And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." Id.

> not prove damages to collect [civil money penalties]. Here, unlike in **Larimore**, the Comptroller does not seek to have the directors reimburse the bank or any other persons for losses resulting from the directors' activities. Instead, the Comptroller simply seeks to impose a penalty on the directors; the money the Comptroller collects will go to the United States Treasury, not to the Bank or any other person. 12 U.S.C. Sec. 1818(i)(2)(vii).

Abercrombie I, 833 F2d at 676.

Second, the court in **Abercrombie** I concluded that the Comptroller's interpretation of his authority to assess civil money penalties for past violations under subsection 1818(i)(2) was not so unreasonable as to be "'blatantly lawless'". Id. at 675-77, The court made clear that it was **not** deciding the merits of the Directors' complaint: "[W]e do not determine whether the Comptroller actually did or did not violate his statutory authority; we hold only that any violation

was not a clear violation." Id at 675.

3. Additional administrative proceedings

The case thus returned to the administrative arena. On January 27, 1988, the October 1985 Notice was amended to indicate that "[e]vidence and details of the violations" were contained in reports issued both before and after the January 31, 1985 examination report. Amended Notice at 1-2. On the first day of the hearing, the ALJ insisted that the specific days of the alleged violations be identified. Tr. of Mar. 15, 1988 at 30-31. A handwritten list was prepared, indicating that the violations continued at least until April 8, 1985.

The ALJ rejected the Directors' contention that section 1818 authorized civil money penalties only for continuing

violations. ALJ Recommended Decision and Order at 113. The ALJ concluded that the Consent Order had been violated, id. at 128, although he found no violation of two articles in the Consent Order, id. at 124. After taking into account the factors found in subsection 1818(i)(2)(ii), the ALJ recommended that the civil money penalty assessments be reduced to $2,000 for Director Hedrick and $1,000 each for Directors Abercrombie, Eckel, Calloway, and Sloan. Id. at 130.

The Comptroller then issued the final decision that is the basis of this appeal. **In re Hedrick**, No. AA-EC-85-120 (Office of the Comptroller of the Currency June 20, 1989) [hereinafter Comptroller's Decision]. The Comptroller concluded that subsection 1818(i)(2)(i) "authorizes the imposition of [civil money penalties] for

past, present, and continuing violations of a cease and desist order." Id. at 7. The Comptroller reasoned that Congress' goals of "discourag[ing] unsound practices and [making] cease and desist orders self-enforceable" could not be served if civil money penalties were available only for ongoing violations. Id. "Moreover, institutions and individuals subject to an order will be less likely to change their conduct if they can violate the order repeatedly and then correct the violations when a Notice appears imminent." Id. at 7-8. The Comptroller also observed that there was no statutory requirement that those in violation of a cease and desist order be given time to cure their violations after the notice of assessment, for cease and desist orders themselves are "adequate notice." Id. at 10.

Furthermore, the Comptroller concluded that the final assessment could be based on evidence of violations not charged in the original notice of assessment, provided the notice was "amended, as was done in this case," id at 13, to give the Directors an opportunity to respond to the true scope of the agency's contentions. Id. at 14.

The comptroller found the Directors in violation of nine of the ten articles, including one of the two articles for which the ALJ had found no violations.[7]

[7] The Comptroller concurred with the ALJ's conclusion that there was insufficient evidence to establish a violation of Article XVIII (requiring the Directors to notify the agency of its intended response to a consultant's report on expenses paid to insiders). Comptroller's Decision at 55-60. The Comptroller rejected, however, the ALJ's conclusion that there was insufficient evidence to find a violation of Article XII (requiring the Directors to submit detailed budget documents and operating

Id at 12. Violations of at least two articles of the amended Consent Order continued even after the October 1985 Notice. Id. at 18, 25. The Comptroller noted the duration of some of the violations:

> While no precise count has been made of the aggregate number of days that the [Directors] were in violation, the number exceeds 300 days just for Article III (requiring documentation for additional loans to criticized borrowers). For Article XII (requiring submission of budgets and operating assumptions), the violation extended ... at least ... 61 days.

Id. at 61-62 (citations omitted). While not imposing the "hundreds of thousands of dollars" of civil money penalties that the Directors thus potentially faced, id at 62, the Comptroller disagreed somewhat with the ALJ's treatment of the statutory factors found in 12 U.S.C. Sec.

assumptions). Id. at 41-45.

1818(i)(2)(ii). For example, the ALJ had noted at least some indications of good faith, ALJ Recommended Decision and Order at 123, and had somewhat minimized the gravity of the violations, id. at 124-25. The Comptroller, in contrast, found the Directors' "good faith to be seriously deficient," Comptroller's Decision at 65, and found the violations to be "more serious" than had the ALJ, id at 67. The Comptroller's final assessment was $15,000 for Director Hedrick and $10,000 each for Directors Abercrombie, Calloway, Eckel, and Sloan. Id. at 70.

II ANALYSIS

[1] The basic question before us is whether the Comptroller appropriately determined that civil money penalties could be assessed for past violations of cease and desist orders. The Directors

contend that both the "present tense" language of the statute and its legislative history "require[] the conclusion that [civil money penalties] can only be assessed for violations which are in the "present tense", existing at the time the Directors are given the "Notice of Assessment" of [civil money penalties]." Petitioners' Br. at 1-2 (emphasis in original). The Comptroller, on the other hand, contends that the language authorizing civil money penalties of "not more than $1,000 per day for each day during which such violation continues" was "intended only as a limitation on the maximum amount of the penalty and was not intended to specify the types of violations for which penalties could be assessed." Respondent's Br. at 27. Alternatively, the Comptroller argues that

the language "is sufficiently ambiguous as to permit that interpretation." Id. Furthermore, he contends that legislative history support his interpretation of the statutory language.

A. Statutory construction

The essential task of a reviewing court that faces an issue of statutory construction is well established. We first must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." **Chevron U.S.A. v. Natural Resources Defense Council**, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). However, if the administering agency fills a gap in the

statute, the court must determine "whether the agency's answer is based on a permissible construction of the statute." **Id.** at 843, 104 S.Ct. at 2782; **see also Fort Stewart Schools v. Federal Labor Relations Auth.**, --- U.S. ---, 110 S.Ct. 2043, 2046, 109 L.Ed.2d 659 (1990); **Larimore v. Comptroller of Currency**, 789 F2d 1244, 1248 (7th Cir., 1986)(en banc) ("agency's interpretation of its authorizing statute need not be the only permissible one in order for it to be sustained").

We must begin with the language of the statute itself. **See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.**, 484 U.S. 49, 108 S.Ct. 376, 380, 98 L.Ed.2d 306 (1987). As this court noted in **Abercrombie I**, the Directors' reading of the statutory language can be

characterized as "reasonable." 833 F2d at 676. Use of present tense verbs throughout the subsection in question can be read as evidencing a congressional intent "to emphasize that Sec. 1818 provides a daily penalty for continuing violations" only, not for past violations. Id. On the other hand, the language in question is not so clear that it can support only the Directors' interpretation. The Comptroller's interpretation of the statutory language is also a reasonable reading.[8]

[8] [8] In support of their argument that the present tense language in the statute precludes penalties for past violations, the Directors have cited the Supreme Court's decision in **Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation**, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). The Court in **Gwaltney** held that 33 U.S.C. Sec. 1365(a) (section 505(a) of the Clean Water Act), which authorizes citizen suits against those "alleged to be in violation," does not permit such suits "for wholly past

Because the statutory language itself is ambiguous, we must turn to other

violations." 484 U.S. at 64, 108 S.Ct. at 384-85. As one part of its rationale, the Court noted: "One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout Sec. 505." Id at 59, 108 S.ct. 382.

Nonetheless, in **dicta**, the Court noted that "it is little questioned that the Administrator may bring enforcement actions to recover civil penalties for wholly past violations." Id. at 58, 108 S.Ct. at 381-82. Subsection 309(d) of the Clean Water Act, which authorizes the civil penalties for violations of that statute, also uses present tense language - although not the more graphic and specific "alleged to be in violation."

> Any person who violates [specified sections of the statute] and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation.

33 U.S.C. Sec. 1319(d).

Consequently, we do not find **Gwaltney** contrary to the Comptroller's position. Indeed, it is somewhat supportive of his position. The language of subsection 309(d) of the Clean Water Act is virtually identical to the language of 12 U.S.C. SEc. 1818(i)(2)(i).

evidence of congressional intent. Therefore, in order to determine whether the Comptroller's decision can be affirmed, we shall next consider what the legislative history and the structure of the statute reveal about the role of the civil money penalty provision in the statutory scheme.

The Comptroller was first authorized to issue cease and desist orders against individuals in 1978. **See** Financial Institutions Regulatory and Interest Rate Control Act of 1978 (FIRA), Pub.L. No. 95-630, Sec. 107(a)(!), 92 Stat. 3641, 3649-50. FIRA also authorized the assessment of civil money penalties for violations of such orders. **Id.** Sec. 107(e)(1), 92 Stat. at 3660.[9]

[9] FIRA also amended section 93 by adding a civil money penalty provision, which was similar to the provision of

To support their contention that civil

section 1818, for the violation of banking laws, and regulations. See Pub.L. No. 95-630, Sec. 103, 92 Stat. 3641, 3643-44 (1978) (codified as amended for the period relevant to this case at 12 U.S.C. Sec. 93(b) and as further amended at 12 U.S.C.A. Sec. 93(b)(West Supp. 1990). Subsection 93(b), unlike subsection 93(a), does not include a requirement that the Comptroller seek enforcement in the courts. The court in **Larimore v. Comptroller of Currency**, 789 F2d 1244 (7th Cir.1986)(en banc), rejected the Comptroller's contention that section 93 thus provided an option to proceed administratively or to sue in district court when seeking to impose personal liability on directors. However, as did the court in **Abercrombie I**, 833 F2d at 876, we conclude that this case can be distinguished from **Larimore** because of the difference between the penalty provision involved here and the damages involved in **Larimore**. Moreover, subsequent to this court's decision in **Larimore**, Congress amended the cease and desist provision of section 1818 to authorize the Comptroller to order indemnification in cases involving unjust enrichment or recklessness. **See** Financial Institutions Reform, REcovery, and Enforcement Act of 1989, Pub.L. No. 101-73, Sec. 902(a)(1)(C), 103 Stat 183, 450 (codified at 12 U.S.C.A. Sec. 1818(b)(6)(A)(West 1989).

money penalties may be imposed only for continuing violations, the Directors point to a number of phrases from a Senate report on a bill that included provisions that ultimately became part of FIRA. As the Directors emphasize, the report indicated that the purpose of civil money penalties was "to help prevent or correct" problems that threatened "the safety or soundness" of banks. S.Rep No. 323, 95th Cong., 1st Sess. 16-17 (1977). Similarly, civil money penalties were to serve as a "deterrent," id. at 8, and were to help make cease and desist orders "self-enforcing," id. at 9.[10] The thrust of the

[10] The Directors also contend that the legislative history indicated that civil money penalties could be imposed administratively only if there existed no other "'effective remedy.'" Petitioners' Br. at 31 (quoting S.Rep. No 323, 95th Cong., 1st Sess. 17 (1977)). They further contend that 12 U.S.C. Sec. 1818(i)(1), which authorizes the Comptroller to seek

Directors' interpretation of the legislative history is that imposition of civil money penalties for past violations cannot serve these goals:

> How does one "deter" past acts? There is no way to deter past acts because they have already occurred, and they are not deterred because they occurred and its [sic] all over with. No amount of dollar penalty can deter a past act.

Petitioners' Br. at 36.

The Directors correctly identify the congressional concern with respect to the safety and soundness of the banks. We do not believe, however, that the legislative

enforcement of cease and desist orders in district court, provided an alternative remedy and that the Comptroller thus was compelled to proceed under that provision or choose some other effective remedy before resorting to the imposition of civil money penalties under subsection 1818(i)(2). However, subsection 1818(i)(1) expressly gives the Comptroller "discretion" to seek judicial enforcement, and we decline to adopt the Directors' reading of congressional intent.

history, read in its entirety, supports the view that Congress saw no value in punishing past violations of an extant cease and desist order. Indeed, the same report relied on by the Directors appears to have contemplated the availability of civil money penalties for past violations, noting that they were "to be assessed **from the first day of the occurrence of any violation.**" S.Rep. No. 323, 95th Cong., 1st Sess. 8 (1977)(emphasis supplied). In similar fashion, the House report noted a need to deal with bank officers "who **have committed** abuses, wherever they may be employed" at the time the Comptroller has sufficient evidence to take action. H.R.Rep. No. 1383, 95th Cong., 2d Sess. 240 (1978), U.S. Code Cong. & Admin.News 1978, pp. 9273, 9370 (minority views)(emphasis supplied). Civil money

penalties also were made applicable only to violations that occurred after enactment of FIRA. See id. at 17-18. At first glance, this element of the legislative history might appear to support the Directors' contention. However, if the committee understood the present tense language of the statute to apply only to continuing violations, there would have been no reason to emphasize that the provision was not retroactive.

Moreover, the Directors' reading of the legislative history ignores the general deterrence function of civil money penalties. Although the Directors in this case can no longer be deterred from violation the Consent Order for the period in question, the potential of civil money penalties could have a strong deterrent effect on other bank officials and,

indeed, on these bank officials in the future.

[2] More fundamentally, the Directors' argument that violators of a cease and desist order must be given an opportunity to comply before they incur monetary sanctions for their violation renders ineffective the role of cease and desist orders in the enforcement of the country's banking laws. If a penalty may be exacted only after the violator once again has endangered the health of the financial institution by flouting the cease and desist order, a good deal of the enforcement potential of such orders is lost. They are meant to have a "self-enforcing" effect on the banking community. Under the directors' interpretation, it would be impossible to fulfill the congressional expectation that

penalties be exacted "from the first day" of the violation. **See** S.Rep. No. 323, 95th Cong., 1st Sess., 8-9 (1977). Civil money penalties are designed to deter not only willful violations but negligent ones as well.[11] The banker under a cease and desist order operates with the knowledge that any deviation from that order-purposeful or otherwise-will result in a significant penalty-whether the authorities discover the violation immediately or later.

Although the legislative history and structure of FIRA does not prove definitively that Congress intended civil money penalties to be available for past violations, we cannot say that the

[11] **Compare** 12 U.S.C. Sec. 93(a) (expressly proscribing knowing violations) with **id.** SEc. 1818(i)(2)(i) (indicating no intent element).

Comptroller's interpretation of congressional intent is unreasonable. Indeed, there is significant support for his position. Consequently, we must conclude that the Comptroller's interpretation of his statutory authority is not impermissible. **See Chevron U.S.A. v. Natural Resources Defense Council**, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

Our conclusion to accept the Comptroller's reading of the statute is bolstered by the re-enactment of civil money penalty provisions in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73, 103 Stat. 183 (FIRREA). It is significant that these provisions continue

to use present tense language.[12] See id. SEc. 907(a), 103 Stat at 462-64 (codified at 12 U.S.C.A. Sec. 1818(i)(2)(West 1989)). Yet, it is abundantly clear that Congress intended the present tense language to apply to past acts. FIRREA provides for retroactive application of

[12] See NLRB v. Bell Aerospace Co., 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974) ("[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight.") (footnotes omitted); see also Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986); Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F2d 310, 316 (7th Cir.1987) cert. denied, 488 U.S. 816, 109 S.Ct. 54, 102 L.Ed.2d 33 (1988). But cf. International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 571, 99 S.Ct. 790, 802, 58 L.Ed.2d 808 (1979) (Burger, C.J., concurring)(understanding of draftsman of amendment in 1970 "would have little, if any bearing" on "construction of definitions enacted in 1933 and 1934").

the new maximum penalties if the conduct

> (1) is not already subject to a notice (initiating an administrative proceeding) ...; and
> (2) occurred after the completion of the last report of examination of the institution involved by the appropriate Federal banking agency ... occurring before the date of the enactment of this Act.

Id. Sec. 907(1), 103 Stat. at 476-77 (codified at 12 U.S.C.A. Sec. 93 note). Although this retroactive provision would not apply to the conduct in this case, this provision does indicate that Congress did not intend to attach prospective-only effect to the present tense language in the statute.

Moreover, section 905(a) of FIRREA authorizes imposition of civil money penalties against individuals even after they have left the service of the covered institution. Id. Sec. 905(a), 103 Stat. 459 (codified at 12 U.S.C.A. Sec.

1818(i)(3). Thus, civil money penalties now are certainly available for past violations. The legislative history of this provision strongly suggest that it was intended as a clarification of existing authority. AS the report of the House Banking, Finance and Urban Affairs Committee stated: "This provision does not create a new offense, but clarifies when the banking agencies may initiate enforcement actions against individuals." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. 393 (1989), U.S.Code Cong. & AdminNews 1989, pp. 86, 189.

B. Application to This Case

[3] The Directors submit that assessment for violations that occurred before the October 1985 Notice gave them no opportunity to cure their violations and limit their liability. They

specifically object to imposition of civil money penalties for violation of Article I (requiring the filing of progress reports on compliance with the Consent Order every sixty days) because a bank examiner had allegedly led them to believe that they were in compliance with that article. The Directors claim that they believed Article I required a compliance report only after the first sixty days, but now acknowledge that they were not in compliance with Article I. Petitioners' Br. at 27. The Directors' contention that they were unfairly misled about Article I is meritless. As the Comptroller noted, "[t]he language of Article I plainly requires the filing of reports ... every sixty days." Comptroller's Decision at 15.

More generally, although it is true

that the issuance of a notice of assessment formally started the procedure by which civil money penalties were imposed,[13] between the time the Directors agreed to the Consent Order and the issuance of the formal notice, the Directors were repeatedly notified that they were not complying with the Consent Order and that they faced the imposition of civil money penalties. The Comptroller did not lull the Directors into a false sense of security by encouraging them to believe that they were in full compliance with the Consent Order and then impose massive civil money penalties for past violations. On this record, we cannot conclude that the Comptroller acted arbitrarily.

[13] See 12 U.S.C. SEc. 1818(i)(2)(i).

[4] The Directors also press an alleged inconsistency between the Comptroller's decision and a position adopted by counsel for the Comptroller at a pre-hearing conference. At that conference, counsel acknowledged that the only charged violations were those included in the report of the January 31, 1985 examination. Petitioners' Br. at 43-44 (citing Tr. of Feb. 26, 1988 at 46). The Directors emphasize that the conference occurred **after** the January 27, 1988 amendment of the October 1985 Notice (which in turn incorporated the violations in the January 31, 1985 report). Although the focus of the Comptroller's final decision was the ten articles in the October 1985 Notice, the decision also reflected later violations of those same articles. **See** Comptroller's Decision at

18, 22.

[5] The Comptroller reasoned that the January 27, 1988 amendment of the October 1985 Notice gave the Directors "'a reasonable opportunity to know the claims of the opposing party and to meet them.'" Id. at 14 (quoting **Morgan v. United States**, 304 U.S.1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938)). As this court has noted, "[i]t is, of course, well settled that administrative pleadings are to be liberally construed and amended." **Brock v. Dow Chem. U.S.A.**, 801 F2d 926, 930 (7th Cir.1986); **see also L.G. Balfour Co. v. Federal Trade Comm'n**, 442 F2d 1, 19 (7th Cir.1971) ("There is no requirement that a complaint in an administrative proceeding enumerate precisely every event to which a hearing examiner may finally attach significance. The purpose of the

administrative complaint is to give the responding party notice of the charges against him."). Administrative pleadings not only may be amended prior to a hearing but also may be clarified during a hearing. See Swift & Co. v. United States, 393 F2d 247, 252 (7th Cir.1968). Absent evidence that a party is misled by an administrative complaint, resulting inn "prejudicial error," we shall not reverse. L.G. Balfour, 442 F2d at 19.

We believe that any inconsistency in the position of the agency, as a result of the statement of counsel at the pre-hearing conference, produced no unfairness. At the hearing itself, the ALJ made clear that he was allowing the introduction of evidence of continuing violations:

> I'll tell you one of the reasons I'm taking is if it's true that present

> tense violations are only the ones for which civil money penalties may be assessed, I would tend to believe that [the Comptroller] is going to argue that the bank is still violating.

Tr. of Mar. 23, 1988 at 62. Thus, the Directors were aware that they potentially faced liability for post-notice violations of the ten articles originally specified in the October 1985 Notice. On this record, we cannot say that the Comptroller committed prejudicial error.

[6] Finally, the Directors contend that civil money penalties are unjustified in this case because the violations for which they were penalized "'were not of sufficient gravity to endanger the safety of the bank.'" Petitioners' Br. at 32 (quoting ALJ Recommended Decision and Order at 128). However, earlier in the same sentence that the Directors quote, the ALJ did find that "the gravity of the

violations were deviations from fully safe and sound banking practices." ALJ Recommended Decision and Order at 127. Moreover, in context, this finding related to one of the factors in 12 U.S.C. Sec. 1818(i)(2(ii), which concerned the appropriate amount of the penalty, not the propriety of assessing any penalty at all. The Comptroller determined that the gravity of the violations was more serious than had the ALJ. See Comptroller's Decision at 67. The Directors have not established that the Comptroller's final assessment was unsupported by substantial evidence.

CONCLUSION

Finally, although we hold that the Comptroller had the legal authority to impose civil money penalties for actions occurring between the issuance of the

cease and desist order and notice of assessment, such authority, even under this now-superseded statutory scheme, was hardly without significant restraints. The statute required that the Comptroller tailor the penalty according to specific criteria. No penalty was assessed without a hearing, and, finally, the Comptroller's determination has been subject to review in this court. As the House committee report noted when these safeguards were first proposed, they should assure that the Comptroller and other agencies with analogous civil money penalty powers "are not arbitrary and capricious in their use of civil money penalties." H.R.Rep. No. 1383, 95th Cong.., 2d Sess 18 (1978), U.S.Code Cong. & Admin. News 1978, p. 9290.

For the foregoing reasons, the decision

of the Comptroller is affirmed.

AFFIRMED.